DePaul University
University Libraries

DePaul Journal of Sports Law

Volume 11
Issue 1 *Spring 2015*

Article 2

Northwestern's Football Players: Unified Team or Unionized Regime? An Analysis on the Collective Bargaining Rights of Student-Athletes

Kassie Lee Richbourg

NORTHWESTERN'S FOOTBALL PLAYERS: UNIFIED TEAM OR UNIONIZED REGIME? AN ANALYSIS ON THE COLLECTIVE BARGAINING RIGHTS OF STUDENT-ATHLETES

*Kassie Lee Richbourg**

TABLE OF CONTENTS

* J.D. Candidate 2016, American University Washington College of Law; B.A. 2013, Political Science, University of Georgia. The author dedicates this article to her parents, Dale and Wendy, her two sisters, Sandi and Ashlee, her entire family, and her close friends for providing a lifetime of love, encouragement, and happiness. The author thanks Professor N. Jeremi Duru for his advice and assistance with this Article. Last, but certainly not least, the author thanks the staff of the DePaul School of Law Journal of Sports Law & Contemporary Problems for editing this Article.

INTRODUCTION

A day in the life of Trevor Coston (T.C.) begins at a 7:00 a.m. meeting with his supervisor.[1] After his morning meeting, T.C. works on various projects until 2:15 p.m.[2] At 2:15 p.m., T.C. attends a preliminary conference before meeting with his supervisor again at 3:45 p.m.[3] Two-hours and fifteen minutes later, T.C. finally ends his day at 6:00 p.m.[4] T.C. spends, on average, about forty-three hours per week preparing for and attending meetings.[5] Since most full-time employed people work about forty-hours per week,[6] it would seem like T.C. is an average full-time employee, right? Wrong.

T.C. is a football player at a NCAA Division I University.[7] But T.C. is not just a football player; he is also a student.[8] Not only does he spend forty-three hours per week preparing for and attending football practices and games, he also spends about thirty-eight hours per week preparing for and attending classes.[9] On average, T.C. spends over eighty hours per week on both athletic and academic related activities.[10] One of the main differences between T.C. and a person who holds two full-time jobs is that T.C. does not get paid—he is a NCAA student-athlete, and as such, he must maintain his status as an amateur, which excludes him from accepting all forms of compensation except for scholarship money.[11] Meanwhile, Division I universities

1. *See* Charlie Merritt, *A Day in the Life of a Division 1 Football Player at UMaine*, THE MAINE CAMPUS (Nov. 3, 2010, 10:42 p.m.), http://mainecampus.com/2010/11/03/rammstein-discography/ (writing about his interview with Trevor Coston, a twenty-one year old football player at the University of Maine).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; *see also Division I Results from the NCAA GOALS Study on the Student-Athlete Experience*, NCAA.ORG 17 (Nov. 8, 2011), http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf (showing the results of an NCAA study into the life of a student-athlete at a Division I university).

6. While the Fair Labor Standards Act does not define full-time employment or part-time employment, the Act states that forty-hours per week is the maximum an employee can work without receiving overtime compensation. 29 U.S.C. §§ 201, 207(a)(1) (2012); *see also Wage and Hour Division*, UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/whd/flsa (last visited Aug. 12, 2014).

7. Merritt, *A Day in the Life of a Division 1 Football Player at UMaine*, *supra* note 2. The NCAA describes Division I universities as having bigger student bodies than Division II and III schools. *See NCAA Division I*, NCAA, http://www.ncaa.org/about?division=d1 (last visited Aug 12, 2014) (noting that Division I schools also manage larger athletics budgets and offer a higher number of scholarships).

8. Merritt, *A Day in the Life of a Division 1 Football Player at UMaine*, *supra* note 2.

9. Division I Results, *supra* note 6, at 18.

10. *Id.* at 20.

11. *See 2013-2014 Guide for the College-Bound Student-Athlete*, NCAA ELIGIBILITY CENTER 18, http://www.ncaapublications.com/productdownloads/CBSA.pdf (requiring student-athletes to

and the NCAA are profiting off of the services rendered by student-athletes just like T.C.[12]

Revenue brought in by ticket receipts, licensing fees, merchandise sales, broadcasting rights, television contracts, and endorsement deals have made NCAA Division I sports a multi-billion dollar industry.[13] While uncompensated student-athletes are the source of this revenue, they are in no position to bargain with their universities or the NCAA because student-athletes are dependent upon their athletic scholarships, which demand that a certain number of hours be dedicated to their respective sports.[14] Furthermore, student-athletes are subject to rules and regulations that many believe to affect their health and safety because they lack relative bargaining power against their universities and the NCAA.

Labor organizations such as the College Athletes Players Association (CAPA) assert that student-athletes should be allowed to unionize and should be afforded collective bargaining rights.[15] In recent years, CAPA has moved for student-athletes to be considered "employees" within the meaning of the National Labor Relations Act (NLRA).[16] As an employee under the NLRA, student-athletes would

maintain their amateur status by not accepting any forms of compensation in connection with their athletic abilities).

12. *See generally* Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1017 (2012) (arguing that student-athletes deserve collective bargaining rights because they allow their schools to bring in so much revenue).

13. *See College Athletics Revenues and Expenses-2008*, ESPN COLLEGE SPORTS, http://espn.go.com/ncaa/revenue (last visited Aug. 12, 2014) (estimating the total revenue for all Division 1 universities in 2008 to be well over five-billion dollars at least); *see generally* Fram & Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, *supra* note 13, at 1017-18.

14. *See How Do Athletics Scholarships Work?*, NCAA.ORG, http://www.ncaa.org/sites/default/files/NCAA%2BAthletics%2BScholarships.pdf (last visited Aug. 12, 2014) (noting that most scholarships are granted for one academic year, to be determined by the coaching staff on a year-by-year basis). There is nothing in the Division I Manual prohibiting coaching staffs from revoking athletic scholarships from athletes who get injured; however, the scholarships cannot be revoked until the end of the scholarship term limit unless a student-athlete renders himself or herself ineligible. *2013-2014 NCAA Division I Manual*, NCAA.ORG 199, 201 (Aug. 1, 2013), http://www.ncaapublications.com/productdownloads/D114.pdf; *see generally* Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013), http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/ (claiming that players who are enlisted "on the promise of an education" may lose their scholarships if they get injured).

15. *Why We're Doing It*, COLLEGE ATHLETES PLAYERS ASSOCIATION, http://www.collegeathletespa.org/why (last visited Aug. 12, 2014).

16. *Northwestern Univ.*, No. 13-RC-121359, 2014 WL 1922054, at *1, 2 (N.L.R.B. Mar. 17, 2014) (hereinafter "CAPA's Post-Hearing Brief") (addressing the issue of student-athlete employee status on behalf of Northwestern University's football team). For general information about the NLRA, see *infra* Part I.A.

be given the chance to vote on whether they would like to be represented by a labor organization and decide which union would represent them for the purpose of bargaining with their employers, the universities.[17]

On January 28, 2014, CAPA filed a petition with Region 13 of the National Labor Relations Board (NLRB)[18] on behalf of the Northwestern University football team.[19] In its petition, CAPA claimed that the Northwestern University football players receiving grant-in-aid scholarships from their employer, Northwestern University, were considered employees within the meaning of the NLRA.[20] CAPA then asserted that as employees, the football players on scholarship should be entitled to choose whether they would like collective bargaining rights.[21] In response to CAPA's petition, Region 13 agreed and held that Northwestern's scholarship-holding football players were statutory employees.[22] However, on April 24, 2014, the National Labor Relations Board in Washington, D.C. (the Board) granted review of Region 13's decision.[23]

Based on precedent, it is likely that the Board will reverse Region 13's decision because Northwestern's football players are primarily students, and as such, they are excluded from employee status under the NLRA.[24] However, due to recent controversy over the President's recess appointments of current Board members, Region 13's decision could also be affirmed.[25] Ultimately, the final determination

17. If student-athletes are deemed employees, and they vote for representation, universities would be obligated to bargain with the representatives. *See* discussion *infra* Part I.B.

18. Region 13 is located in Chicago, Illinois and it serves parts of Illinois and Indiana. *See Who We Are*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/region/chicago (last visited Aug. 13, 2014) (informing potential petitioners that Region 13 is responsible for conducting elections, investigating charges of unfair labor practices, and protecting the collective bargaining rights of employees). When a union representative wants to file a petition with the NLRB, he or she will do so through one of the NLRB's regional offices. *See generally infra* Part I.B.

19. Northwestern Univ., No. 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 26, 2014) (hereinafter "Region 13's Decision").

20. *Region 13's Decision*, *supra* note 20, at *2.

21. *Id.*

22. *Id.* For discussion of Region 13's decision, see *infra* Part III.C.

23. *Northwestern Univ.*, No. 13-RC-121359, 2014 WL 1653118, at *1 (N.L.R.B. Apr. 24, 2014) (hereinafter "NLRB Grant of Review"). As of July 8, 2014, all parties and *amici* had filed the necessary documents for the Board to review.

24. For analysis of relevant Board precedent, see *infra* Part II.

25. *See* Lawrence E. Dube, *Obama Will Again Nominate Block to NLRB; Attorney Held Invalid Recess Appointment*, BLOOMBERG BNA (July 14, 2014), http://www.bna.com/obama-again-nominate-n17179892243/ (noting President Obama's attempt to get Senate confirmation of a new Board nominee which could ensure "the [B]oard's 3-2 Democratic majority for at least several more years").

of employee status lies with the Board. Will Northwestern University's scholarship football players remain a unified team or will they transform into a unionized regime?

Part I of this Comment discusses the history of the NLRA and the creation of the NLRB. Part II surveys past NLRB decisions, focusing on the methods used by the NLRB to determine whether university-employed students are employees within the meaning of the NLRA. Part III explains Region 13's determination of the employee status of Northwestern University's scholarship football players. Part IV discusses the arguments of both parties to the *Northwestern* case. Part V analyzes the validity of the parties' arguments and Region 13's reasoning, and makes the argument that NLRB precedent does not support the unionization of student-athletes. Finally, Part VI considers the likelihood of Board reversal and concludes by assessing the future of collective bargaining rights in the realm of university athletics.

I. JULY 5, 1935: THE NLRA, THE BOARD, AND WHAT IT MEANS TO BE AN EMPLOYEE

A. The Labor Movement and the Passage of the NLRA

The Industrial Revolution marked a major turning point in the American economy. While factory growth created many new employment opportunities for the masses that flocked to major U.S. cities, these new opportunities came with a price. Factory workers were subjected to harsh working conditions that they were powerless to change. [26] Trade unions dedicated to improving working conditions existed at the time, although participation was sparse.[27] As working conditions worsened and employers continued to underpay their workers, the labor movement gained momentum which caused tensions to rise between employees and employers.[28]

26. JAMES STUART OLSEN, ENCYCLOPEDIA OF THE INDUSTRIAL REVOLUTION IN AMERICA 248 (Robert L. Shadle ed. 2002) (describing that it was common for factory employees to work sixteen-hour days in crowded factories that did not have adequate air ventilation or any other safety precautions).

27. A few trade unions in existence include the National Labor Union Trade, the Knights of Labor, and the American Federation of Labor. *See* Grant W. Murray, *A Brief History of Labor Unions in the United States* 2 (date accessed July 20, 2014) (unpublished manuscript) (on file with Northern Michigan University), available at http://ellerbruch.nmu.edu/classes/cs255w02/cs255students/GMURRAY/p11/history.pdf.

28. *See id.* at 2-3 (stating that unions became proactive by utilizing the strike as a mechanism for fighting back against employers and urging Congress to pass pro-labor legislation).

In 1914, labor unions gained a huge victory when Congress passed the Clayton Act, which legalized the use of strikes and boycotts.[29] A few years later, the War Labor Board (WLB) was created to promote labor peace.[30] The WLB had no enforcement powers; however, for the first time in American history, Congress recognized employees' rights to unionize and participate in collective bargaining through chosen representatives.[31] In 1926, Congress passed the Railway Labor Act, which stressed the importance of collective bargaining as a tool.[32] Despite legislation recognizing employees' rights to unionize, employers refused to engage in collective bargaining with employees.[33] This non-compliance with national labor policy motivated American lawmakers to reform labor legislation.

In 1935, Senator Robert F. Wagner introduced the National Labor Relations Act, which proposed to protect employees' rights to unionize and enforce employers' obligations to bargain collectively with union representatives.[34] Additionally, the NLRA proposed to create the National Labor Relations Board (the Board), an independent administrative agency tasked with the responsibility to enforce collective-bargaining rights for the purpose of protecting the general welfare of employees, employers, and the United States economy.[35]

After passing the Senate and clearing the House of Representatives, President Roosevelt signed the NLRA into law on July 5, 1935.[36] Two years after its enactment, the NLRA and the Board gained legitimacy when the United States Supreme Court declared the NLRA constitutional.[37]

---

29. *See id.* at 3; *see also* 15 U.S.C. § 17 (2006) (permitting labor organizations "to carry out their legitimate objectives").

30. *See Pre-Wagner Act Labor Relations*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited Aug. 13, 2014).

31. *See id.*

32. *See id.*

33. *See The NLB and "The Old NLRB"*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/who-we-are/our-history/nlb-and-old-nlrb (last visited Aug. 13, 2014).

34. *See The 1935 Passage of the Wagner Act*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited Aug. 13, 2014).

35. *What We Do*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/what-we-do (last visited July 19, 2014).

36. *The 1935 Passage of the Wagner Act*, *supra* note 35.

37. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 40, 43 (1937) (holding that Congress has the power to regulate anything that has a close and substantial relationship to commerce and that includes labor) ("we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.").

B. The Board's Process

The Board is an independent federal agency, comprised of five members that are appointed by the President and confirmed by the Senate.[38] The Board also has twenty regional offices in more than fifteen states.[39] The Board and its regional offices are vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative.[40]

When a group of employees seek to be represented as a collective bargaining unit, they must hold an election to vote on a union representative.[41] In order to vote, the group of employees must first file a petition with its regional office.[42] Once the group files a petition, the regional office conducts an investigation and decides whether to accept or dismiss the petition.[43] If the regional office accepts the petition, it then conducts formal proceedings.[44] After the formal proceedings, the Regional Director issues a decision either directing an election or dismissing the case.[45] Parties may request review of the Regional Director's decision by the Board.[46] If the Board denies review, the decision of the Regional Office stands.[47] If the Board grants review, it issues a decision affirming, modifying, or reversing the Regional Director's decision.[48] If the Board's decision favors the employees, the Board orders that an election be conducted, in which case the employees will vote on whether or not they want to pursue collective-bargaining rights with their employer and who will represent them.[49]

---

38. *See The NLB and "The Old NLRB," supra* note 34.

39. *See Regional Offices*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/who-we-are/regional-offices (last visited Aug. 13, 2014).

40. *See The NLRB Process*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/resources/nlrb-process (last visited Aug. 13, 2014).

41. An election is held for the purpose of determining whether a group of employees want collective bargaining rights and what union it wants to represent its interests when bargaining with its employer. *See id.*

42. *See id.*

43. The Board will accept or deny a petition based on jurisdiction, union qualification, and contractual obligation. *See Conduct Elections*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/what-we-do/conduct-elections (last visited Aug. 13, 2014).

44. Formal proceedings involve hearings in which each party will come before a regional office and give testimony. *See The NLRB Process*, *supra* note 41.

45. *See id.*

46. Parties opposing the request for review are allowed to file a brief in opposition with the Board. *See id.*

47. *See id.*

48. *See id.*

49. *Id.* If a majority of the bargaining unit votes in favor of unionization, the employer is obligated to engage in collective bargaining with the elected representative. *See How Do Unions Work?*, UNION PLUS, http://www.unionplus.org/about/labor-unions/how-do-unions-work (last

Underlying the Board's determination of whether a group of employees has the right to pursue collective-bargaining rights with their employers is the NLRA's meaning of the term "employee." If an individual is an employee within the meaning of the NLRA, the Board will enforce that employee's rights under the NLRA. However, the NLRA offers little clarification of the term "employee," thus leaving it up to the Board to determine "employee" status.

C. Employee Status

The NLRA's definition of "employee," which is meant to clarify who is considered an employee, is anything but helpful. The term "employee" is circularly defined by the NLRA as "any employee."[50] If a person is deemed an employee, that person falls under the protection of the NLRA, as enforced by the Board. The NLRA specifically excludes certain individuals from employee status.[51] However, it is unclear who is actually included in the definition. Due to the vague definition of employee, the Board has had an arduous time determining who falls within the NLRA's meaning. Subsequently, the United States Supreme Court (Court) has played a crucial role in helping to define and give meaning to the term "employee."[52]

When the Court attempts to define statutory language, it occasionally looks to the dictionary. In *NLRB v. Town & Country Electric, Inc.*,[53] the Court cited to the ordinary definition of the term "employee," which defines an employee as any "person who works for another in return for financial or other compensation."[54] In the same

visited Aug. 13, 2014) (noting that most union representatives bargain for better employment terms and conditions such as wages, hours, and benefits, but that employers do not have to agree to any specific terms).

50. 29 U.S.C. § 152(3) (2012) ("the term 'employee' shall include any employee").

51. The NLRA excludes independent contractors, agricultural laborers, domestic workers, and employees subject to the Railway Labor Act. *See id.*

52. *See NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (including paid union workers to the NLRA definition of "employee"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (including undocumented aliens to the NLRA definition of "employee"); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (excluding employees of religious institutions from the NLRA definition of "employee"); *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (excluding retired persons from the NLRA definition of "employee"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (including company foreman to the NLRA definition of "employee"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 11 (1944) (including independent contractors to the NLRA definition of "employee"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (including job applicants to the NLRA definition of "employee). *But see* 29 U.S.C. § 152(3) (amending NLRA to overrule *Packard* and *Hearst* by explicitly excluding supervisory employees and independent contractors from the NLRA definition of "employee").

53. 516 U.S. 85 (1995).

54. *Id.* at 90 (citing to the *American Heritage Dictionary*, 604 (3d ed. 1992)).

case, the Court noted that, usually, when Congress leaves the term "employee" undefined in a statute, it is assumed that Congress meant to describe an employee using the common law agency doctrine.[55] The Court stated that while the common law definition of the term "employee" seems to coincide with the "breadth of the ordinary definition,"[56] deference should be given to the Board's construction of the word since Congress created the Board to administer the NLRA.[57] Recognizing that "the Board often possesses a degree of legal leeway" when it interprets the NLRA, the Court rejected the common law construction of the term "employee" and gave precedent to the Board's interpretation.[58]

Many years of previous Board decisions have helped give definition to the term "employee." When considering the ordinary definition,[59] the Board's determination of employee status might be relatively easy in cases involving traditional groups of workers. For example, retired persons are excluded from the NLRA definition of "employee" because they are no longer working for an employer for compensation.[60] Similarly, the Board determined that paid union workers fell within the terms of the NLRA because they could still be hired by another employer to do work for compensation.[61] In these cases, the Board's construction of the term "employee" coincides with the common law agency doctrine.[62] However, the Board's determination of employee status becomes more difficult when the consideration involves nontraditional workers.

Accordingly, the Board may depart from the common law definition to determine the employee status of these unorthodox groups.

55. The common law agency doctrine compared the employer-employee relationship to the conventional master-servant relationship, which exists when the servant performs services for the master, under the master's control, and in return for compensation. *See id.* at 94.

56. *Id.* at 90 (defining an employee as any "person who works for another in return for financial or other compensation").

57. *Id.* at 94.

58. *Town & Country Electric, Inc.*, 516 U.S. at 89-90, 94; *see, e.g. Sure-Tan, Inc.*, 467 U.S. at 891 (asserting that the Board's interpretation of the term employee will be upheld if reasonably defensible); *see generally Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984) (declaring that an agency's construction of a statutory term is given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute").

59. Any "person who works for another in return for financial or other compensation." *See Town & Country Electric, Inc.*, 516 U.S. at 90 (citing to the *American Heritage Dictionary* 604 (3d ed. 1992).

60. The Board amended the NLRA to specifically exclude retired persons after the Court, in *Allied Chem. & Alkali Workers of America*, decided to include them in the definition of employee. 404 U.S. at 166.

61. *See Town & Country Electric, Inc.*, 516 U.S. at 90-91.

62. *See* cases cited *supra* note 56 and accompanying text.

For instance, supervisory employees perform services for their employers and receive compensation for those services. Despite accordance with the common law structure, the Board amended the NLRA to explicitly exclude supervisory employees from the definition of "employee."[63] Likewise, the Board departed from the common law agency doctrine to exclude individuals employed by religious institutions even though compensation may be exchanged for services performed.[64] The Board has also included job applicants to the NLRA definition of "employee," despite the fact that they have technically not been hired by an employer nor have they received compensation for work.[65] Similarly, undocumented aliens have been considered employees within the meaning of the NLRA although it is technically illegal for an employer to hire an undocumented non-citizen.[66]

As demonstrated, the Board's departure from the common law structure has been the trend when dealing with unorthodox groups of workers. One unorthodox group of workers that the Board has dealt with frequently throughout the past forty years is college students. In line with past decisions, the Board has departed from its use of the common law agency doctrine when determining the employee status of college students.

II. The College Years: The Board and the University Cases

Starting in the 1970s, the Board was tasked with the responsibility of determining the employee status of individuals who are not only employed by educational institutions, but are also enrolled as students at the same universities or colleges.[67] When dealing with these types of cases, the Board's precedent shows a departure from the common law agency doctrine.[68] Behind the Board's inquiry is whether the individual in question shares a predominantly academic relationship with the educational institution.[69]

Until the late 1990s, the Board's established principle indicated that students employed by the same school they were enrolled in were not

63. 29 U.S.C. § 152(3) (2012).

64. *See Catholic Bishop of Chi.*, 440 U.S. at 490 (recognizing that allowing NLRA protection of religious institutions would possibly conflict with the guarantees of the First Amendment).

65. *See Phelps Dodge Corp.*, 313 U.S. at 177 (agreeing with the Board's inclusion of job applicants).

66. *See Sure-Tan, Inc.*, 467 U.S. at 883 (agreeing with the Board's inclusion of undocumented aliens).

67. *See Adelphi Univ.*, 195 N.L.R.B. 639 (1972); s*ee also* discussion *infra* Part II.A.

68. *See* discussion *infra* Part II.A, II.B, II.C.

69. *See* discussion *infra* Part II.A.

statutory employees because they were "primarily students."[70] But, with each new case came factual nuances, which have led to a weakened Board's precedent by the end of the twentieth century.[71] Instead of applying its own established precedent, the Board reverted back to using the common law agency doctrine to determine the employee status of student-employees.[72] Nevertheless, in the early 2000s, the Board returned to its initial inquiry and explicitly rejected the use of the common law structure when determining the employee status of university-employed students.[73] Since 2004, the Board's precedent has been that individuals employed by and enrolled as students, at the same educational institution are not employees within the meaning of the NLRA because they share a predominantly academic relationship with their universities and colleges.[74]

The Board's tumultuous handling of these cases reflects public policy concerns involving the university-student relationship.[75] The general fear is that if university-employed students are granted employee status under the NLRA, it might undermine the traditional educational relationship between the university and the student.[76] Of particular importance is how the Board has grappled with these public policy concerns when the traditional roles of university-employed students change.

Recently, the Board has faced questions involving the employee status of student-athletes who, while not employed by their universities, are paid by them for services performed. [77] Before the Board can determine the employee status of student-athletes, it must first analyze its own precedent. While the Board does not have precedent pertaining to student-athletes, it does have forty-years of past decisions involving college students, which can be applied to cases involving student-athletes.

70. *See id.*

71. *See* discussion *infra* Part II.B.

72. *See id.*

73. *See* discussion *infra* Part II.C.

74. *See id.*

75. *See id.*

76. *See id.*

77. The services performed are the duties related to the athletes' sports, and the payment is in the form of scholarships and stipends. *See generally* sources cited *supra* notes 14-15 and accompanying text.

A. The Leland Stanford Principle

In 1972, the Board was presented with the question of whether graduate assistants employed by Adelphi University (Adelphi)[78], who were also enrolled graduate students at the University, should be included in the bargaining unit of regular faculty.[79] Instead of referring to the common law agency doctrine to make its determination, the Board considered many factors including time spent on services versus time spent on educational requirements, payments for services performed, and the graduate assistants' relationship to the regular faculty.[80]

The Board rejected the argument that Adelphi's graduate assistants enjoyed "a community of interest with the regular faculty," because the graduate assistants did not enjoy any of the benefits offered to the regular faculty.[81] Unlike the regular faculty members, Adelphi's graduate assistants were "guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they were assigned."[82] Furthermore, the Board noted that Adelphi's graduate assistants had to be enrolled as students at the University before they could actually be employed by it.[83] The Board found that Adelphi's graduate assistants were primarily students because they did not share a community of interest with Adelphi's regular faculty and their employment was contingent upon their continued status as students.[84] Accordingly, the Board excluded Adelphi's graduate assistants from the bargaining unit of regular faculty.[85]

78. Adelphi University is a private educational institution located in Long Island, New York. *See Adelphi*, 195 N.L.R.B. at 639.

79. *Id.*

80. *Id.* at 640.

81. *Id.* (noting that the graduate assistants "do not have faculty rank, are not listed in the University's catalogues as faculty members, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University personnel plan, have no standing before the University's grievance committee, and . . . do not participate in any of the fringe benefits available to faculty members," except for University health insurance).

82. *Id.*

83. *Id.*

84. *Adelphi*, 195 N.L.R.B. at 640.

85. As a basis for its holding, the Board cited to two decisions from the previous year. *Id.* at n. 8. In *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971), the Board allowed the employee status of one research associate; however, the Board in *Adelphi* noted that, unlike Adelphi's graduate assistants, the research associate was not simultaneously a student. *Id.* In *Long Island University (Brooklyn Center)*, 189 N.L.R.B. 909 (1971), the Board denied the employee status of the University's technical laboratory assistants. *Id.* Similar to Adelphi's graduate assistants, the lab assistants were enrolled at the University, pursuing advanced degrees, and were performing services to assist regular faculty members. *Id.*

Two years later, the Board reaffirmed and reinforced *Adelphi's* holding when graduate assistants at The Leland Stanford University (Stanford)[86] petitioned the Board for employee status.[87] Similar to the graduate assistants in *Adelphi*, Stanford's graduate assistants were employed by and enrolled as students at the University.[88] To make its determination, the Board considered the relationship between the student and the university instead of analyzing employee status with the common law structure.[89] The Board considered many of the same factors as it did in *Adelphi*[90], but its analysis was focused primarily on the nature of the payments received by the graduate assistants in relation to the services they performed.[91]

The Board rejected the argument that the payments received by Stanford's graduate assistants were directly related to services they performed, and as such the graduate assistants were employees within the meaning of the NLRA.[92] Instead, the Board considered the payments to be financial aid that the graduate assistants used to pursue their own academic degrees rather than wages in exchange for work.[93]

Furthermore, the Board found that Stanford's graduate assistants did not share a community of interest with the University's regular faculty.[94] While the graduate assistants did not enjoy regular faculty benefits such as vacation time, sick leave, and retirement options, they did enjoy many benefits of being a student such as access to student housing, healthcare, and campus activities.[95] Of greater significance to the Board was the fact that Stanford's graduate assistants' payments were tax exempt, unlike regular faculty wages.[96] The Board asserted that Stanford's graduate assistants, like the graduate assistants in *Adelphi*, were primarily students because they lacked a community of interest with the University's regular faculty.[97] Subsequently, the Board found that Stanford's research assistants had a predominantly academic, rather than economic, relationship with

86. The Leland Stanford Junior University is a private educational institution located in Stanford, California. *See The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

87. *Id.* at 621.

88. *Id.* at 621.

89. *Id.* at 622-23.

90. *See* cases cited *supra* note 81 and accompanying text.

91. *Stanford*, 214 N.L.R.B. at 622.

92. *Id.* at 622-23.

93. *Id.* at 621.

94. *Id.* at 621-22.

95. *Id.* at 622.

96. *Id.*

97. *Stanford*, 214 N.L.R.B. at 623.

the University.[98] Going one step further than its holding in *Adelphi*, the Board not only excluded Stanford's graduate assistants from the bargaining unit of regular faculty, but it also held that students employed by and enrolled at the same university are not employees within the meaning of the NLRA because they are primarily students.[99]

Shortly after *Stanford*, Congress amended the NLRA to include nonprofit hospitals and their employees.[100] This amendment led to the integration of millions of new workers into the protection of the NLRA.[101] In 1976 and 1977, the Board was faced with the question of whether it would extend *Stanford* to exclude medical interns, residents, and fellows (house staff members) from employee status under the NLRA.[102] Following *Stanford's* analysis instead of the common law structure, the Board found that the house staff members were primarily students rather than employees because they were engaged in educational courses.[103]

To make its decision, the Board also considered relevant policy concerns and the intended purpose of the NLRA.[104] The Board declared that the NLRA was intended to cover predominantly economic, not academic, relationships, and allowing collective bargaining rights would infringe upon the academic freedoms of the educational institution.[105] For over the next two decades, the Board's departure from the common law agency doctrine and its reliance on the *Stanford Principle*[106] went undisturbed.

98. *Id.*

99. *Id.*

100. *See St. Clare's Hosp.*, 229 N.L.R.B. 1000 (1977).

101. *Id.* at 1000.

102. *See id.*; *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

103. *St. Clare's*, 229 N.L.R.B. at 1003-04; *Cedars-Sinai*, 223 N.L.R.B. at 253.

104. *St. Clare's*, 229 N.L.R.B. at 1003-04; *Cedars-Sinai*, 223 N.L.R.B. at 253-54.

105. *St. Clare's*, 229 N.L.R.B. at 1003-04; *Cedars-Sinai*, 223 N.L.R.B. at 253-54.

106. The basic premise of the *Stanford Principal* is that if a university-employee, who is also enrolled as a student at university, is "primarily" a student, the individual is not a statutory employee under the NLRA. *See Stanford*, 214 N.L.R.B. at 622-23 (stating that a university-employed student is considered to be primarily a student if the relationship between the individual and the university is more academic than economic). The relationship between the university and the university-employed student is predominantly academic if (1) the individual is enrolled as a student at the university; (2) the individual enjoys the benefits made available to all students; (3) the individual does not share a community of interest with the regular faculty; (4) the individual's job at the university is contingent upon the continued enrollment as a student; (5) the payments received by the individual are not based on the nature of the services performed; and/or (6) the services performed further the individual's academic career. *See id.* at 622-23 (mentioning that the Board also considers the intended purpose of the NLRA when determining employee status).

B. Unprecedented Change: BMC and NYU

In 1999, the Board was presented with the question of whether medical interns, residents, and fellows at Boston Medical Center (BMC)[107] were employees within the meaning of the NLRA.[108] Unlike the graduate assistants in *Adelphi* and *Stanford*, BMC's house staff members received their advanced degrees prior to being employed by the Hospital, where they continued their medical training.[109] While employed at BMC, the house staff members were enrolled in medical classes to supplement their practical training.[110] The Board rejected the argument that just because BMC's house staff members were engaged in educational courses they were primarily students.[111] Considering the common law agency doctrine for the first time since *Adelphi* and *Stanford*, the Board found that the house staff members provided services for, and under the control of, BMC in return for compensation.[112] However, the Board still considered whether BMC shared a predominantly economic or academic relationship with its house staff members.[113]

Unlike the graduate assistants in *Adelphi* and *Stanford*, BMC's house staff members received payments directly related to the services they performed, and the payments they received were subject to taxation.[114] The house staff members spent more time engaged in their house staff duties than they did on educational training, and they enjoyed the same benefits as other hospital employees, including workers' compensation, paid vacation time, and insurance coverage.[115] The Board found that the relationship between BMC and its house staff members was predominantly economic, not academic, because they shared a community of interest with the regular faculty.[116]

Similar to *Cedars-Sinai* and *St. Clare's*, the Board also considered relevant policy concerns and the intended purpose of the NLRA.[117] Finding a predominantly economic, rather than academic, relationship between BMC and its house staff members, the Board concluded that

107. Boston Medical Center is a nonprofit teaching hospital located in Boston, Massachusetts. *See Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

108. *Id.* at 152.

109. *Id.* at 152-56.

110. *Id.*

111. *Id.* at 160-61.

112. *Id.*

113. *BMC*, 330 N.L.R.B. at 160-61.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 163-65.

it would not be contrary to the intended purpose of the NLRA if it allowed them collective bargaining rights.[118] Therefore, the Board held that BMC's interns, residents, and fellows were employees within the meaning of the NLRA.[119]

One-year later, the Board used *BMCs* reasoning to grant employee status to graduate assistants at New York University (NYU).[120] Like the graduate students in *Adelphi* and *Stanford*, NYU's graduate assistants were employed by and enrolled as students at NYU.[121] Similarly, NYU's graduate assistants also received payments for the services they performed, in the form of scholarships and stipends.[122] While the Board found that NYU's graduate assistants were primarily students, it rejected the argument that the graduate assistants could not be statutory employees under the common law.[123] As it did in *BMC*, the Board relied on the common law agency doctrine to find that NYU's graduate assistants performed services for the University, under its exclusive control, and in return for compensation.[124] However, the Board still considered whether NYU's graduate assistants shared a predominantly academic relationship with the University.[125]

The Board stated that although the graduate assistants were primarily students, the services they performed were not predominantly educational because the services were not required to obtain a NYU degree.[126] Furthermore, the Board reasoned that since the graduate assistants were not required to perform services to obtain an academic degree, they were working in exchange for pay, not in the pursuit of education.[127] The Board concluded that NYU and its graduate assistants shared a predominantly economic, employer-employee relationship, not an academic relationship.[128] Citing to the Supreme Court, the Board reasoned that the NLRA broadly defines the term "employee" to include "any employee" unless explicitly excluded.[129] Accordingly, the Board held that because the NLRA does not explicitly exclude graduate assistants from the definition of "employee," gradu-

118. *Id.* (noting that the intended purpose of the NLRA is to cover economic relationships).

119. *BMC*, 330 N.L.R.B. at 152 (overruling *Cedars-Sinai* and *St. Clare's*).

120. New York University is a private educational institution located in New York City, New York. *See New York Univ.*, 332 N.L.R.B. 1205 (2000).

121. *Id.* at 1205.

122. *Id.* at 1206.

123. *Id.*

124. *Id.* at 1205-06.

125. *Id.* at 1207-09.

126. *NYU*, 332 N.L.R.B. at 1207-09.

127. *Id.* at 1206-07.

128. *Id.*

129. *Id.* at 1205 (citing to *Sure-Tan, Inc.*, 467 U.S. at 883).

ate assistants "plainly and literally fall within the meaning" of the NLRA.[130]

While the Board did not overrule *Adelphi* or *Leland Stanford*, its decision in *NYU* reversed over twenty-five years of Board precedent by asserting that, under the common law agency doctrine, graduate assistants employed by and enrolled at the same university are employees within the meaning of the NLRA even though they are primarily students.[131] Nonetheless, four years later, the Board changed its mind yet again.[132]

C. Brown and the Return to Pre-NYU Precedent

In 2004, the Board was presented with the question of whether graduate assistants employed by Brown University (Brown),[133] also enrolled as graduate students at the University, were employees within the meaning of the NLRA.[134] The Board prefaced its analysis with the assertion that it does not have jurisdiction over relationships that are primarily educational.[135] Rejecting the strict structural analysis of the common law agency doctrine, the Board analyzed the relationship between the students and the University in accordance with its pre-*NYU* decisions.[136] To determine if Brown and its graduate assistants shared a predominantly academic relationship, the Board considered the following four factors: (1) the graduate assistants' status as students; (2) the role the graduate assistants' duties in their education; (3) the community of interest shared by the graduate assistants and the regular faculty; and (4) the nature of the payments received by the graduate assistants.[137]

Considering the first factor, the Board focused on the undisputed fact that Brown's graduate assistants were students who had to be enrolled at the University before being employed by the University.[138] Therefore, the Board concluded that the graduate assistants were primarily students.[139] Considering the second factor, the Board also noted that the graduate assistants spent the majority amount of their

130. *Id.* at 1206.
131. *Id.* at 1205-06.
132. *See Brown Univ.*, 342 N.L.R.B. 483 (2004).
133. Brown University is a private educational institution located in Providence, Rhode Island. *See id.* at 484.
134. *Id.* at 483.
135. *Id.* at 488.
136. *Id.* at 488-89.
137. *Id.*
138. *Brown*, 342 N.L.R.B. at 488.
139. *Id.*

time on the courses they were enrolled in at the University, rather than their assistantship duties, and, therefore, their duties were merely one aspect of their degree requirements.[140] The Board then considered whether the graduate assistants and the regular faculty shared a community of interest.[141]

The Board found that, similar to the research assistants in *Adelphi* and *Stanford*, Brown's graduate assistants enjoyed the many benefits of being a student, such as access to student housing, healthcare, and campus activities.[142] Likewise, the Board noted that the graduate assistants did not enjoy regular faculty benefits such as vacation time, sick leave, and retirement options.[143] The Board also noted that a significant difference between Brown's regular faculty and its graduate assistants was the difference between the types of payments received.[144] Unlike regular faculty wages, Brown's graduate assistants received payments in the form of scholarship and stipends, which were tax exempt.[145]

Considering the last factor of its analysis, the Board noted that in order to receive payments, Brown's graduate assistants first had to be enrolled at the University.[146] The Board also found that the amount received by the graduate assistants was not dependent upon how well they performed their duties or how much time they spent performing their duties.[147] Accordingly, the Board stated that the graduate assistants' payments were not based on the nature of the services they performed.[148] Concluding its four-factor analysis, the Board held that Brown's graduate assistants had a predominantly academic, rather than economic, relationship with the University.[149]

In addition to its analysis, the Board also considered the relevant policy concerns and the intended purpose of the NLRA.[150] Citing to the Supreme Court, the Board stated that "the Court has recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"[151] The Board declared that the intended purpose of the NLRA was to cover economic rela-

140. *Id.* at 488-89.
141. *Id.* at 489.
142. *Id.*
143. *Id.*
144. *Brown*, 342 N.L.R.B. at 489.
145. *Id.* at 489.
146. *Id.* at 488.
147. *Id.* at 489.
148. *Id.*
149. *Id.*
150. *Brown*, 342 N.L.R.B. at 487-88.
151. *Id.* at 487 (citing to *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980)).

tionships between employers and employees.[152] Finding that the graduate assistants and the educational institution share mutual academic interests, the Board determined that it would be detrimental, to both labor and educational policies, if the emphasis of that relationship changed from an academic one to an economic one.[153] The Board concluded that predominantly academic interests "are completely foreign to the normal employment relationship and . . . are not readily adaptable to the collective-bargaining process."[154]

Throughout its decision, the Board criticized its own reasoning in *NYU* and its use of the common law agency doctrine.[155] In *Brown,* the Board not only rejected the common law structure but also stated that even if the graduate assistants were employees at common law, they were not employees within the meaning of the NLRA.[156] The Board held that its determination of employee status is dependent upon whether Congress intended to include graduate assistants, and that its determination is not based solely on common law concepts.[157] Finding that the graduate assistants were primarily students who enjoyed a predominantly educational relationship with Brown, the Board denied employee status, rejected the use of the common law agency doctrine, and overruled *NYU.*[158]

Since its decision in 2004, the Board has relied on its reasoning established in *Brown*. However, in 2014, the Board denied review of a regional decision, which held that medical interns, residents, and fellows at the Beth Israel Medical Center were employees within the meaning of the NLRA.[159] As the dissent noted, review should have been granted because *BMC* and *Brown* were incorrectly applied and that this incorrect application could lead to conflicting standards of law.[160] Furthermore, the dissent argued that review should have been granted because the Board had recently granted review in *Northwestern University*, and it invited parties to file briefs on the application of *Brown* as it related to student-athletes at private universities.[161]

152. *Id.* ("The Act was premised on the view that there is a fundamental conflict between the interests of the employers and employees . . .").

153. *Id.* at 487-88.

154. *Id.* at 488.

155. *Id.* at 491.

156. *Brown*, 342 N.L.R.B. at 491.

157. *Id.* at 491.

158. *Id.* at 483.

159. *Beth Israel Med. Ctr.*, No. 02-RC-121992, 2014 WL 21612758, at *1 (N.L.R.B. June 11, 2014).

160. *Id.* at 1.

161. *Id.*

III. MARCH 26, 2014: REGION 13'S DECISION IN NORTHWESTERN UNIVERSITY

A. The Contenders

On January 28, 2014, CAPA filed a petition with Region 13 on behalf of the Northwestern University football team.[162] In its petition, CAPA claimed that the Northwestern University football players (football players) receiving grant-in-aid scholarships (scholarships) from their employer, Northwestern University (Northwestern), are "employees" within the meaning of the NLRA; and, as such, should be entitled to choose whether they would like collective-bargaining rights.[163] CAPA relied on the common law agency doctrine for its determination of employee status.[164] Under this doctrine, CAPA argued that the football players were employees because they performed services for and under the control of Northwestern in return for compensation.[165]

Abiding by the Board's process, [166] Region 13 investigated CAPA's claims, heard testimony from both parties, and allowed both parties to file post-hearing briefs before making its decision. Throughout Region 13's investigation, Northwestern asserted that its scholarship football players were primarily students, not statutory employees.[167] Relying on the Board's decision in *Brown*, Northwestern argued that its football players had a predominantly academic, rather than economic, relationship with the University.[168] Northwestern rejected CAPA's use of the common law agency doctrine and instead argued that the Board had never applied the common law test to determine the employee status of students.[169]

B. And the Winner Is . . .

On March 26, 2014, Region 13 held that Northwestern's scholarship football players were employees within the meaning of the NLRA.[170] Beginning its analysis, Region 13 placed the burden of proof on Northwestern to establish its justification for excluding its scholarship

162. *Region 13's Decision*, *supra* note 20, at 1.

163. *Id.* at 2.

164. *CAPA's Post-Hearing Brief*, *supra* note 17, at 16.

165. *Id.* at 17-24

166. *See* discussion *supra* Part I.B.

167. *Brief to the Regional Director on Behalf of Northwestern University*, NATIONAL LABOR RELATIONS BOARD 2 (Mar. 17, 2014) (hereinafter "Northwestern's Post-Hearing Brief"), http://www.nlrb.gov/case/13-RC-121359?page=4.

168. *Id.* at 4.

169. *Id.* at 47, 51-52.

170. *Region 13's Decision*, *supra* note 20, at 1.

football players from employee status.[171] Region 13 declared that Northwestern failed to meet its burden.[172]

In its Decision and Direction of Election, Region 13 applied the common law agency doctrine to find that Northwestern's scholarship football players were statutory employees because they performed services for and under the control of the University in return for compensation.[173] Region 13 asserted that the football players provided services for Northwestern, which allowed the University to bring in millions of dollars in revenue.[174] Moreover, Region 13 found that the football players were subject to special rules under the direct supervision of the coaching staff. [175] Region 13 also found that the football players' scholarships were similar to wages because they were directly related to the services the athletes performed.[176]

In consideration of the common law test, Region 13 focused much of its attention on the compensation aspect.[177] Arguing that the scholarships were directly related to services performed, Region 13 asserted that the football players were recruited only for their athletic abilities.[178] Region 13 also argued that the scholarships were directly related to services performed because the coaching staff could immediately reduce or cancel the scholarship amount for a variety of reasons.[179] While only two football players lost their scholarships in the past five years, Region 13 explained that the scholarships were directly related to services performed because there is an imminent threat of amount reduction or cancellation.[180] For Region 13, the compensation aspect of the common law structure was the sole distinguishing factor between the scholarship football players and the "walk-on" players.[181] To that end, Region 13 denied walk-on players

171. *Id.* at 11 (asserting that "A party seeking to exclude an otherwise eligible employee from coverage of the Act bears the burden of establishing a justification for the exclusion").

172. *Id.*

173. *Id.* at 12.

174. *Id.* (observing that from 2003 to 2012, Northwestern's football program generated approximately $235 million in revenue).

175. *Id.* at 13-14 (finding that the coaching staff prepared daily schedules for the football players, and that the football players had to adhere to rules which only applied to them, such as obtaining permission before traveling off campus or speaking to the media).

176. *Region 13's Decision*, *supra* note 20, at 13 (arguing that the football players work in exchange for compensation, not an educational pursuit, because they do not get academic credit for the services they perform).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Walk-on players are allowed to try out for the team after they have been admitted to Northwestern, but they do not get scholarship money for playing on the team. *Id.* at 15.

employee status "for the fundamental reason that they do not receive compensation for the athletic services that they perform."[182]

Continuing its analysis, Region 13 rejected the application of *Brown*, arguing that, unlike Brown's graduate assistants who performed services related to their degree requirements, Northwestern's football players performed services unrelated to their academic studies.[183] Region 13 declared that the common law agency doctrine was applicable, stating that the Supreme Court necessitates its use when "employee" is left undefined by Congress.[184] Region 13 argued, however, that, even if *Brown* were applicable, the football players would still be statutory employees because the relationship between Northwestern and its scholarship football players was predominantly economic, not academic.[185] Finding that the football players satisfied the common law agency doctrine, Region 13 held that they could not be denied employee status just because they were students.[186] Consequently, Region 13 declared that Northwestern's scholarship football players were employees within the meaning of the NLRA, and ordered an election to be held.[187] The election results were placed on hold however because the Board granted review of Northwestern's request for review of Region 13's decision.[188]

IV. April 24, 2014: Board Review Granted

Noting that review was warranted in this case because Region 13's decision raised substantial concerns about conflicting legal standards,

182. *Region 13's Decision*, *supra* note 20, at 15.

183. *Id.* at 15.

184. *Id.* at 12.

185. *Id.* at 15-16 (arguing that the football players are not primarily students because they spend a majority of their time on football related activities and those activities are not inextricably linked to their academic pursuits).

186. *Id.* at 16.

187. *Id.* at 1. Region 13 ordered an election to be held so that the eligible bargaining unit of football players could vote on whether they wanted to pursue collective bargaining rights with the University through their elected representative, CAPA.

188. *See Northwestern's Request for Review of Regional Director's Decision and Direction of Election*, National Labor Relations Board 1 (Apr. 9, 2014), http://www.nlrb.gov/case/13-RC-121359?page=4 (arguing that Region 13's decision should be reversed because it based its decision on the testimony of a single CAPA witness, and that it ignored the applicability of *Brown*); *NLRB Grant of Review*, *supra* note 24, at 1 (granting review because Region 13's decision raises substantial issues); *see also Petitioner's Response to Request for Review of Regional Director's Decision and Direction of Election*, National Labor Relations Board 1 (Apr. 16, 2014), (http://www.nlrb.gov/case/13-RC-121359?page=4 (opposing Board review of Region 13's decision, maintaining that *Brown* is not applicable to this case because the football players' duties are irrelevant to their academic pursuits).

the Board invited the parties, and *amici*, to file briefs.[189] The Board asked the parties to address whether *Brown* or the common law agency doctrine was applicable in determining whether Northwestern's scholarship football players are employees within the meaning of the NLRA.[190] On July 3, 2014, both CAPA and Northwestern filed briefs with the Board, which reestablished their claims.[191]

A. Player 1: CAPA

CAPA claimed the Supreme Court allows for the use of the common law agency doctrine when Congress does not define the word "employee" in a statute, and any departure from the common law "must be based on a statutory policy that clearly requires such a departure."[192] Reasserting that the common law structure is applicable in this case, CAPA declared that Northwestern's football players' employee status is dependent upon whether they perform services for and under the control of the University in return for compensation.[193]

CAPA stated that the evidence presented to Region 13 demonstrates that the football players perform services for Northwestern that substantially benefit the University.[194] Citing to the testimony of one former Northwestern football player,[195] CAPA claimed that the student-athletes' principle time commitment is football because they treat it like a full time job on a year round basis.[196] Additionally, CAPA contended that since the services provided by Northwestern's football players generate millions of dollars per year in revenue for the University, the football program is a commercial enterprise, not an extracurricular activity.[197]

189. *Northwestern Univ.*, No. 13-RC-121359, 2014 WL 1881179, at 1 (N.L.R.B. May 12, 2014) (asking the parties to address certain issues including relevant Board precedent and policy considerations).

190. *Id.* at *1.

191. *Brief for Petitioner College Athletes Players Association*, NATIONAL LABOR RELATIONS BOARD 1 (July 3, 2014), http://www.nlrb.gov/case/13-RC-121359?page=1(hereinafter "CAPA's Brief to the Board"); *Northwestern University's Brief to the Board on Review of Regional Director's Decision and Direction of Election*, NATIONAL LABOR RELATIONS BOARD 1 (July 3, 2014) (hereinafter "Northwestern's Brief to the Board), http://www.nlrb.gov/case/13-RC-121359?page=1.

192. *See CAPA's Brief to the Board*, *supra* note 192, at 8 (citing to *Town & Country Electric, Inc.*, 516 U.S. at 85).

193. *Id.* at 9.

194. *Id.* at 13; *see supra* note 175.

195. Kain Colter is a former Northwestern football player, co-captain, and a founding member of CAPA. *See id.* at 10.

196. *Id.*

197. *Id.* at 14.

CAPA then asserted that the football players' duties are subject to Northwestern control because the coaching staff supervises all activities.[198] To demonstrate its claim, CAPA implored that all football related activities are mandatory, even the activities labeled "voluntary."[199] Furthermore, CAPA argued that the football players' duties are valued above the football players' academic pursuits because the football players have to schedule their classes around their football schedule.[200] Even more, CAPA contended that Northwestern controls the football players' duties because the athletes have to abide by special rules that do not apply to other students, and these are another means of control, which "enhance the benefits Northwestern derives from the players' services."[201]

Finally, CAPA implored that Northwestern compensates the football players for the services they perform because their scholarships are directly related to the nature of their services.[202] CAPA emphasized that the football players are recruited solely because of their athletic ability.[203] Moreover, CAPA argued that the scholarship awards are directly related to the services performed because the football players receive no class credit, and their awards can be reduced or cancelled at any time for any reason.[204] Concluding that the football players are employees because they satisfy the common law test, CAPA also considered the intended purpose of the NLRA.[205]

CAPA declared that allowing student-athletes the right to unionize so that they can bargain over the terms and conditions of their employment is consistent with the policy of the NLRA.[206] CAPA maintained that the relationship between Northwestern and its football players is predominantly economic and the NLRA was intended to cover economic, employer-employee relationships.[207] CAPA stated that, since allowing collective bargaining rights is consistent with the purpose of the NLRA, the Board should not create policy exceptions to deny those rights to common law employees.[208] Lastly, CAPA asserted that any policy arguments against the football players' em-

198. *CAPA's Brief to the Board*, *supra* note 192, at 14.
199. *Id.* at 14-15.
200. *Id.* at 16 (referring to the testimony of a Northwestern employee).
201. *Id.* at 17-18.
202. *Id.* at 18-20.
203. *Id.*
204. *CAPA's Brief to the Board*, *supra* note 192, at 19.
205. *Id.* at 22.
206. *Id.*
207. *Id.*
208. *Id.*

ployee status are irrelevant to whether they are employees within the meaning of the NLRA.[209]

B. Player 2: Northwestern

Introducing its argument, Northwestern asserted that its scholarship football players are "first, foremost, and always" students because the University only admits them after it determines that the student-athletes have the potential to succeed academically.[210] Reasserting the application of *Brown*, Northwestern maintained that the football players are primarily students, and that they have a predominantly academic relationship with the University.[211] Northwestern contended that Region 13's decision was skewed because it was based on the testimony of CAPA's "lone fact witness."[212] Rejecting Region 13's use of the common law agency doctrine, Northwestern contended that the football players are not statutory employees because allowing them to engage in collective bargaining would "unavoidably entangle the Board in academic decisions."[213]

Arguing that collective bargaining rights should not be extended to its scholarship football players, Northwestern stated that the Supreme Court has recognized that academic institutions vastly differ from the industrial institutions that the NLRA was intended to cover.[214] Northwestern argued that Region 13 misapplied the common law test, which has its roots in the traditional employer-employee relationship.[215] Northwestern cited to the Board's longstanding precedent, which affirms the use of *Brown* when deciding the employee status of university-employed students.[216] Northwestern maintained that *Brown* is controlling because it recognizes the "unique nature of the academic setting."[217]

Additionally, Northwestern stated that even if the common law agency doctrine is applicable, the football players are still not statutory employees because their scholarships are not compensation.[218]

209. *Id.*

210. *Northwestern's Post-Hearing Brief*, *supra* note 168, at 1.

211. *Northwestern's Brief to the Board*, *supra* note 192, at 1.

212. *See supra* note 196.

213. *Id.*

214. *Id.* at 14 (citing to *Yeshiva Univ.*, 444 U.S. at 672).

215. *Id.*

216. *Id.* at 15.

217. *Northwestern's Brief to the Board*, *supra* note 192, at 14 (explaining that *Brown* properly denied the common law structure when determining the employee status of university-employed students because the Board must consider the academic relationship between the university and its students).

218. *Id.* at 34.

Northwestern claimed that Region 13 ignored the fact that scholarships are wholly different from the wages of the regular faculty, in that they are not based on performance of services and are not taxable.[219] Northwestern also argued that it is immaterial that the football players are subject to special rules because, like any other extracurricular activity, "rules are essential for any functioning group activity."[220] Moreover, Northwestern asserted that it is also immaterial that the University generates revenue from the football program because universities derive revenue from many other student activities.[221] Northwestern referred to the undisputed fact that a person cannot come to the University for the sole purpose of playing football, and that all students are required to maintain a certain level of academic excellence.[222]

Northwestern maintained that if Region 13 had applied *Brown*, it would have held that the football players are primarily students, not statutory employees.[223] Ultimately, Northwestern asks that the Board reverse Region 13's decision.[224] The only question left for the Board to determine is whether Northwestern's football players will remain a unified team or become a unionized regime?[225]

V. Unified Team or Unionized Regime?

A. The Playbook

In *Town & Country*, the Supreme Court gave precedent to the Board's interpretation of the term "employee."[226] The Court conceded that in the past, when Congress left the term "employee" undefined in a statute, it assumed that Congress meant to define the term using the common law agency doctrine.[227] However, the Court held that since Congress created the Board to administer the NLRA, the Board's interpretation of vague terms within the NLRA is "entitled to considerable deference."[228] As such, the Board considers the intended purpose of the NLRA when trying to define a vague term.

The Board has longstanding precedent denying employee status to those who are primarily students sharing a predominantly academic

219. *Id.* at 34-35.
220. *Id.* at 30.
221. *Id.* at 32.
222. *Id.* at 2.
223. *Northwestern's Brief to the Board*, *supra* note 192, at 2.
224. *Id.* at 1-2.
225. July 8, 2014 marked the deadline for filing briefs with the Board.
226. *Town & Country Electric, Inc.*, 516 U.S. at 89-90, 94; *see* discussion *supra* Part I.C.
227. *Id.* at 94; *see supra* note 56.
228. *Id.*; *see supra* note 59.

relationship with the university.[229] Until *NYU*, the Board never applied the common law agency doctrine when determining the employee status of individuals who were primarily students at the same universities where they were employed.[230] As seen in *Adelphi*, the Board considered the students' community of interest with the regular faculty, not the common law test.[231] Likewise, in *Stanford*, the Board's analysis focused primarily on the nature of the payments received by the students, not the common law test.[232]

The common law test reappeared in *BMC* when the Board held that being a student does not automatically eliminate employee status.[233] However, the Board's use of the common law test in *BMC* was appropriate because unlike the individuals in *Adelphi* and *Stanford*, the house staff members in *BMC* were not students; they were just taking supplemental courses.[234] Furthermore, BMC was a teaching hospital, not a traditional university like Adelphi and Stanford.[235] Had BMC's house staff members been pursuing academic degrees at a traditional academic institution, the Board would have found that they were primarily students, and therefore, not employees within the meaning of the NLRA. But the Board incorrectly applied *BMC* to the *NYU* case, which was concerned with individuals who were actually pursuing their advanced degrees at traditional educational institutions.[236] While the Board's decision in *NYU* interrupted the longstanding precedent that the common law test does not apply to student cases, it was nevertheless reestablished four years later in *Brown*.[237]

In *Brown*, the Board codified its past considerations into a four-factor analysis, which considered the relationship between the student and the university.[238] The Board clearly rejected the use of the common law test when determining the employee status of university-employed students who share a predominantly academic relationship with their educational institutions.[239] Holding that its decision in *NYU* was completely erroneous, the Board overruled it and asserted

229. *See* discussion *supra* Part II.

230. *See id.*; *cf. BMC*, 330 N.L.R.B. at 152 (applying the common law structure because the individuals in question were not primarily students).

231. *See* discussion *supra* Part II.A.

232. *See id.*

233. *See* discussion *supra* Part II.B.

234. *See id.*

235. *See supra* note 108.

236. *See* discussion *supra* Part II.B.

237. *See* discussion *supra* Part II.C.

238. *See id.*

239. *See id.*

that the NLRA does not have jurisdiction in an academic setting.[240] Accordingly, the Board's longstanding pre-*NYU* precedent and *Brown* are controlling when the employee status of students, employed by and enrolled at the same university, is being determined—not the common law of agency doctrine.

Northwestern presents the Board with a novel issue; but just because the issue is new, it does not mean the Board has to implement a new line of reasoning. On the contrary, the Board has a well-established rule that individuals who are primarily students are not employees within the meaning of the NLRA.[241] Giving deference to the Board's interpretation of the term "employee" as it relates to students, it is logical that the Board's interpretation will be applied to *Northwestern,* considering the football players are students. CAPA argues that *Brown* is inapplicable because the Board has never concluded that being a student automatically excludes employee status.[242] While the NLRA does not specifically exclude students from employee status, the Board has consistently held that being a statutory employee and being primarily a student at the same educational institution are mutually exclusive.[243]

B. Brown Breakdown

To determine the employee status of Northwestern's scholarship football players, the Board will examine the relationship between the University and its student-athletes. Applying *Brown*, the Board will consider the following factors: (1) the football players' status as students; (2) the role of their football duties in their education; (3) the relationship they share with the regular faculty; and (4) the nature of their scholarships.[244]

Northwestern's football players share a predominantly academic relationship with the University because they are primarily students. To play football, the student-athletes must first be admitted into Northwestern and then they must maintain their status as students.[245] Region 13 stated that the football players would not have been considered for admission into Northwestern if not for their athletic ability.[246] However, both Northwestern and the NCAA require stu-

240. *See id.*
241. *See* discussion *supra* Part II.
242. *CAPA's Brief to the Board*, supra note 192, at 14-15.
243. *See* discussion *supra* Part II.
244. *See* discussion *supra* Part II.C.
245. *Northwestern's Brief to the Board*, *supra* note 192, at 5.
246. *Region 13's Decision*, *supra* note 20, at *9.

dent-athletes to meet certain academic requirements to be eligible for Division I sports.[247] Therefore, Northwestern's football players would not have been admitted into the University if not for their academic achievements.

While the football players do spend many hours dedicated to their sport,[248] their principle time concern is focused on obtaining a Northwestern degree, as evidenced by the simple fact that if they do not maintain a level of academic excellence, they cannot play football. Even more so than that, the NCAA actually limits the amount of time student-athletes can dedicate to a sport. [249] Northwestern is dedicated to helping its football players achieve academically, mandating a class attendance policy and providing the players a wide range of educational tools, including private tutors and study skills programs.[250] Northwestern's dedication to its student-athletes' education is further exemplified by the fact that it has the highest percentage of graduating football players of all Division I universities.[251] Northwestern's football players are primarily students because being a student-athlete is predicated on the ability to meet certain academic requirements. While participating in extracurricular activities is a vital component to receiving a well-rounded education, ultimately, an individual cannot go to college just to play football.

Northwestern's football players share a predominantly academic relationship with the University because playing football is just one aspect of obtaining a Northwestern degree. Northwestern offers numerous extracurricular activities for its students and these opportunities teach valuable life lessons like leadership, commitment, and time management.[252] The fact that Northwestern does not offer class credit for performing their football duties indicates just how dedicated the University is to providing educational courses that require rigorous thinking and active learning. Northwestern's scholarship football players not only get a chance to play for a nationally ranked team but they also get a world class education at an internationally renowned educational institution—all for free.

---

247. *Id.* at 5-6; *2013-2014 Guide for the College-Bound Student-Athlete*, *supra* note 12, at 9 (requiring that student-athletes graduate from high school with passing test scores in core courses).

248. *See* sources cited *supra* notes 2-11 and accompanying text.

249. *See 2013-2014 NCAA Division I Manual*, *supra* note 15, at 230 (limiting practice times to a maximum of four hours per day and twenty hours per week).

250. *See Northwestern's Brief to the Board*, *supra* note 192, at 7-8.

251. *Id.* at 7.

252. *Id.* at 3.

Northwestern's football players share a predominantly academic relationship with the University because they are fundamentally different from the regular faculty who share an economic relationship with Northwestern. Northwestern's regular faculty enjoys the normal benefits of employment, including vacation time, retirement opportunities, and paid sick leave. On the other hand, the football players have access to student-only benefits like health insurance, extracurricular activities, and financial aid. A significant indicator that Northwestern's football players do not share a community of interest with the regular faculty is the fact that their scholarships, unlike the regular faculty's wages, are tax exempt.[253]

Northwestern's football players share a predominantly academic relationship with the University because they are offered financial aid, which helps them pursue their academic degrees. To get an athletic scholarship, the football players have to first be enrolled as students at Northwestern.[254] The scholarships allow the football players to afford the costs of a Northwestern education. Instead of receiving an actual payment, the University automatically credits the football players' student accounts.[255] The amount that the football players receive is not based on the nature of the football duties, as evidenced by the fact that some football players never participate in a single game, yet they still get scholarship money.[256] Moreover, the NCAA specifically prohibits the reduction or cancellation of scholarships before it terminates, unless the student voluntarily withdraws from the team or becomes ineligible.[257] Northwestern cannot reduce or cancel a players' scholarship money due to inability to perform or contribute to the team.[258] In the past five years, Northwestern has only denied scholarship renewal twice, and those two non-renewals were based on violations of rules applicable to all University students.[259] Ultimately, the football players' scholarships are not related to the performance of their duties because the scholarships cannot be reduced or canceled for a players' inability to perform.

Northwestern proffered more than enough evidence to establish that it shares a predominantly academic relationship with its football players. This is not an economic relationship between an employer and an employee "grounded on the performance of a given task where

253. *Id.* at 6-7.
254. *Id.*
255. *Id.*
256. *Northwestern's Brief to the Board*, *supra* note 192, at 6-7.
257. *See 2013-2014 NCAA Division I Manual*, *supra* note 15, at 199.
258. *See id.*
259. *Northwestern's Brief to the Board*, *supra* note 192, at 4.

both the task and the time of its performance is designed and controlled by an employer."[260] Rather, the relationship between Northwestern and its football players is one "where the students have chosen an activity on which to spend the time necessary, as determined by the activity's need."[261] A predominantly academic, university-student relationship does not fit into the strict structure of the common law test, which was designed to determine economic, employer-employee relationships.[262]

C. Common Law Shakedown

The Board has never applied the common law agency doctrine as it relates to the employee status of students. In *BMC*, the common law test was appropriate because the individuals in question were not students.[263] And the Board's use of the common law test in *NYU* was distinctly overruled in *Brown*.[264] Even if the Board applied the common law test to the *Northwestern* case, the football players would still not gain employee status.

The football players are choosing to participate in an extracurricular activity while pursuing their Northwestern degrees. The duties they perform for the activities they voluntarily chose to participate in are not services just because they benefit Northwestern. Furthermore, it is irrelevant that the football players perform their duties under the control of Northwestern. The university-student relationship is predicated on the University asserting some aspect of control over its students. Northwestern's football players choose to play football, and for any group activity to run efficiently there must be an aspect of control. However, the existence of an aspect of control over the football players' duties does not mean that the players' scholarships are related to those duties. According to Region 13, the distinguishing factor between Northwestern's scholarship football players and "walk-on" players was the receipt of payments, but the scholarships are not compensation.[265] Thus, because the players do not receive compensation under the common law test, they are excluded from employee status.

Even assuming, *arguendo*, that Northwestern's football players satisfy the common law test, they would still not be statutory employees because such status would be inconsistent with the intended purpose

260. *Stanford*, 214 N.L.R.B. at 621.
261. *Id.*
262. *See* cases cited *supra* notes 151-55 and accompanying text.
263. *See* discussion *supra* Part V.A.
264. *See* discussion *supra* Part II.C.
265. *See* discussion *supra* Part IV.C.

of the NLRA.[266] The NLRA was not intended to cover academic relationships and the issues arising from that relationship. However, Region 13 rejected Northwestern's argument that just because CAPA might try to bargain over academic issues, it does not mean that they will.[267] Region 13 refused to deny employee status based on speculation.[268] But the contention that CAPA might try to bargain over academic issues is anything but speculative.

In CAPA's initial petition to Region 13, it indicated that one of its main goals was to bargain with Northwestern over additional financial aid for the football players.[269] First, CAPA cannot argue for additional financial aid when its main basis for asserting common law employee status is that the scholarships are not financial aid but are instead compensation. Second, however the scholarships are categorized, they are inextricably linked to the football players' academic pursuits because they are used solely for the purpose of obtaining a Northwestern degree. It would unequivocally interfere with Northwestern's academic freedoms if CAPA were allowed to bargain with the University over an issue that could determine the football players' status as students. Still considering the intended purpose of the NLRA, there are many other policy reasons for denying Northwestern's football players' employee status.

D. Sideline Considerations

Extending collective bargaining rights to Northwestern's scholarship football players would have a chaotic effect on all NCAA football teams, because the Board's decision would only apply to private universities.[270] Scholarship football players at public universities would be disadvantaged competitively compared to their counterparts at private universities who would be allowed to bargain for improved health and safety standards and additional financial aid. Region 13's decision would not only create an unequal playing field between NCAA football teams, but it could potentially affect all NCAA sports.

Region 13's sole basis for extending NLRA employee status to Northwestern's scholarship football players was that they perform services for the University in return for compensation.[271] Presumably, all

266. *See* discussion *supra* Part II.C.

267. *Region 13's Decision*, *supra* note 20, at *14.

268. *Id.*

269. *CAPA's Post-Hearing Brief*, *supra* note 17, at *1.

270. *Jurisdictional Standards*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited Aug. 16, 2014) (explaining that the Board only has statutory jurisdiction over private sector employees).

271. *See* discussion *supra* Part III.B.

scholarship-receiving student-athletes at private universities would be granted employee status because they are working in exchange for compensation. Therefore, Region 13's decision could create a level of unfair competition among all NCAA sponsored sports.

Allowing Northwestern's scholarship football players to bargain collectively with the University could actually cause more harm to the student-athletes than good. The IRS specifically excludes scholarship grants from taxation unless services are required to receive the payment.[272] Affirming Region 13's decision would be to admit that the football players' scholarships are based on service performance, and this admission would necessitate taxation of their scholarships. Taxing the football players' scholarships would be counterintuitive to CAPA's bargaining goal seeking additional financial aid for the student-athletes.[273]

Similarly, affording the football players' collective bargaining rights would not actually improve the health and safety issues that they are concerned with. The football players seek to bargain over rules that are actually implemented by the NCAA, not Northwestern, and the NCAA is under no obligation to bargain with student-athletes. Northwestern, on the other hand, is not only obligated to adhere to NCAA rules and regulations or risk possible sanctions, but it is also obligated to bargain with its scholarship football players or risk unfair labor practice charges.[274]

Northwestern's "Catch-22" demonstrates the exact policy concerns the Board considers when analyzing the intended purpose of the NLRA. Essentially, allowing Northwestern's scholarship football players the right to unionize would effectuate a lose-lose situation for all of the parties involved because the student-athletes would gain nothing from bargaining, Northwestern would be stuck between a rock and a hard place, and fairness in competition of all NCAA sports would be dismantled. Thus, student-athletes are not employees within the intended purpose and meaning of the NLRA.

---

272. 26 U.S.C. §§ 117 (a), (b)(1).

273. The football players seek employee status to bargain for more financial aid, but employee status necessitates taxation of scholarships, which would effectuate a loss in the actual amount of financial aid the athletes are already receiving from Northwestern.

274. For example, if the Board allows the student-athletes to unionize, they could potentially seek to bargain over compensation. Northwestern is required to at least bargain with them or it will face unfair labor practice charges from the Board. However, the NCAA prohibits the schools from compensating their student-athletes because of amateurism requirements. If Northwestern bargained with its football players over compensation, they risk possible sanctions from the NCAA.

VI. POST-GAME ANALYSIS

The NLRA was intended to cover the predominantly economic, employer-employee relationship because conflicting economic interests define the relationship.[275] The university-student relationship is defined by mutual academic interests—mainly, the education of the student.[276] Since the case of first instance,[277] the Board has consistently held that it does not have jurisdiction over predominantly academic relationships because it would be inconsistent with the purpose of the NLRA.[278] Furthermore, longstanding Board precedent denies the application of the common law agency doctrine when its determination involves individuals who are primarily students employed by and enrolled at traditional educational institutions.[279]

The essence of Northwestern's relationship with its football players is predominantly academic, not economic. Northwestern is a traditional educational institution and its football players are primarily students. As such, *Brown* must be applied, Region 13's decision must be reversed, and employee status must be denied. Nonetheless, the Board may overrule itself, just as it did in *Brown*, and affirm Region 13's decision.

While precedent strongly favors the Board reversing Region 13's decision, political factors may influence a different outcome.[280] In June 2014, the Supreme Court invalidated the President's recess appointments to the Board.[281] However, the President is attempting to ensure that the Board maintains its Democratic majority for the next several years.[282] The Board has already denied review of a regional decision granting employee status to medical residents, fellows, and interns.[283] As it did with *BMC*, the Board could use its current rea-

275. Employers are seeking to create a product or provide a service for the cheapest means possible, and employees are seeking to earn as much compensation as they can for the services they provide. *See* discussion *supra* Part II.C.

276. *Id.*

277. *See Adelphi*, 195 N.L.R.B. at 639. For discussion and holding of *Adelphi*, *see supra* Part II.A.

278. *See* discussion *supra* Part II.

279. *See id.*

280. The Board is currently controlled by a Democratic majority due to three controversial recess appointments made by the President in 2011. *See* Dube, *Obama Will Again Nominate Block to NLRB; Attorney Held Invalid Recess Appointment*, *supra* note 26.

281. *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014) (ruling that the NLRB lacked properly appointed members to have a quorum).

282. *See* Dube, *Obama Will Again Nominate Block to NLRB; Attorney Held Invalid Recess Appointment*, *supra* note 26 (noting that the President is likely to achieve Senate confirmation of his nominee for the Board).

283. *See* case cited *supra* note 160 and accompanying text.

soning to erroneously extend employee status to student-athletes as it did with the graduate assistants in *NYU*.

In any event, whether the Board affirms, reverses, or modifies Region 13's decision, there will be ramifications because of the vast number of interested parties.[284] There is also great potential for *Northwestern* to face judicial review by the Supreme Court since the novel issue has caused conflicting applications of the law. Nevertheless, Board precedent should prevail and student-athletes should be denied employee status within the meaning of the NLRA. With Board review currently pending, the only question to be determined now is whether Northwestern University's football players will remain a unified team or transform into a unionized regime.

284. Interested parties include Northwestern University, other private and even public universities, CAPA, other student labor organizations, student-athletes, students, the NCAA, etc.